U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: APR 1 4 2015 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (the director) denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as an IT consulting and software development business. It seeks to permanently employ the beneficiary in the United States as a systems analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).[1] The priority date of the petition is August 18, 2013.[2]

The director denied the petition on the ground that the beneficiary did not have the requisite five years of qualifying post-baccalaureate experience between the date he received his bachelor's degree in India and the priority date of the petition.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

Classification

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1). The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the

[1] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).
[2] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).
[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

(A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or

(B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

Therefore, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Further, an "advanced degree" is a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

Part H of the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Master's degree in engineering or related fields.
H.5. Training: None required.
H.6. Experience in the job offered: 36 months of experience.
H.7. Alternate field of study: Computer science or related fields.
H.8. Alternate combination of education and experience: Bachelor's degree plus five (5) years of experience.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None Accepted.
H.14. Specific skills or other requirements: N/A.

Part J of the labor certification states that the beneficiary possesses a bachelor's degree in engineering from India, completed in 2003. As evidence of the beneficiary's educational credentials the record includes photocopies of the beneficiary's academic transcripts, provisional certificate and degree certificate from the , showing that the beneficiary completed a program of study that culminated with a final examination in May 2003 and the awarding of a Bachelor of Engineering degree in information technology on September 15, 2004.

According to a May 20, 2006 academic equivalency evaluation from Education Evaluation and Immigration Services (EEIS), the beneficiary's Indian degree is equivalent to a bachelor's degree in information technology from an accredited college or university in the United States. This evaluation accords with information in the Educational Database for Global Education (EDGE), created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), which states that a Bachelor of Engineering in India is a four-year degree and comparable to a U.S. bachelor's degree in that field. U.S. Citizenship and Immigration Services (USCIS) considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[4]

As the beneficiary's degree is not equivalent to a U.S. master's degree, he does not qualify for the proffered position under the terms of the labor certification based solely on his education. The beneficiary must have at least five years of qualifying post-baccalaureate experience in addition to his U.S.-equivalent bachelor's degree to be eligible for classification as an advanced degree professional and qualify for the proffered position under the terms of the labor certification.

Part K of the labor certification states that the beneficiary qualifies for the offered position based on experience as a project trainee/systems analyst with [redacted] India, from February 3, 2003 to March 31, 2003; a systems analyst/software engineer with [redacted] India, from May 5, 2003 to April 9, 2004; a systems analyst/senior production development engineer with [redacted] India, from April 12, 2004 to March 13, 2007; a software engineer with the petitioner from April 12, 2007 to July 12, 2008; and in the proffered position with the petitioner from July 13, 2008 to June 25, 2014, the date the labor certification was signed. No other experience is listed. The ETA Form 9089 was signed by both the petitioner and the beneficiary under penalty of perjury. In response to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?," the petitioner answered "no." In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable.[5] Here, the record indicates that the beneficiary's employment with the petitioner as a software engineer from April 12, 2007 to July

[4] In *Confluence International, Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that we provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the beneficiary's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the beneficiary's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification required a degree and did not allow for the combination of education and experience.

[5] A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

> 5) For purposes of this paragraph (i):
>
> . . .
>
> (ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

12, 2008 was in a position in which the job duties are not substantially similar to the position offered. However, the beneficiary's experience in the proffered position from July 13, 2008 with the petitioner may not be used as qualifying experience.

On October 10, 2014, the director denied the petition on the ground that the beneficiary did not have the requisite five years of qualifying experience between the date he received his bachelor's degree in India on September 15, 2004 and the date he began employment in the proffered position with the petitioner on July 13, 2008. The director noted that while the beneficiary took the final examination of his baccalaureate degree program in May 2003, his degree was not conferred until September 15, 2004. Experience gained prior to this date, the director held, was not post-baccalaureate experience. Therefore, the director declined to consider the beneficiary's experience with and calculated his qualifying experience with as running from September 15, 2004 to March 13, 2007. Combining that time with the beneficiary's qualifying experience with the petitioner the beneficiary had 44 months and 26 days (3 years, 8 months and 26 days) of qualifying, post-baccalaureate experience. Since this total fell short of five years, it did not meet the job requirements of the ETA Form 9089.

According to the petitioner, the beneficiary earned his bachelor's degree upon completion of his final examination in May 2003. The petitioner asserts that the beneficiary has more than five years of post-baccalaureate experience in his jobs with and the petitioner up to July 2008, thus meeting the experience requirements of the labor certification and applicable regulations to qualify him as an advanced degree professional.

The pertinent regulatory language, quoted by the director in his decision and notice of intent to deny (NOID), is at 8 C.F.R. § 204.5(k)(3)(i)(B). It reads as follows:

> To show that the alien is a professional holding an advanced degree, the petition must be accompanied by an *official academic record showing that the alien **has** a United States baccalaureate degree or a foreign equivalent degree*, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

(Emphasis added.) We agree with the director that the regulatory language highlighted above requires that the beneficiary have his baccalaureate degree in hand, not just be eligible for it, before his "post-baccalaureate experience" can begin to be counted.

On appeal, the petitioner contends that it is common for Indian universities to issue diplomas significantly later than the date on which studies are completed and that the date of completion of studies is aligned most accurately to the date of completion of the final semester of studies in a degree program. The petitioner argues that convocation is often delayed by non-academic processing such as protracted administrative processing or the failure of the student to complete necessary forms or pay required fees.

The petitioner contends that the director did not give proper weight to a September 12, 2014 evaluation from Dr. Dr.

states that the beneficiary completed all of the required classes toward the Bachelor of Engineering Degree as of May, 2003 and was issued a diploma on September 15, 2004. He states that due to an administrative practice far different from that of universities in the U.S., did not issue the official bachelor's diploma when the candidate completed the bachelor's program in May 2003 and that the most accurate point to reflect the date of completion of the bachelor's program would be the month in which the candidate completed his studies (May 2003), rather than the date on which the university finally issued the diploma. He states that the Indian educational system and society regard the date of completion of the final semester of studies as the most accurate marker of degree completion and attainment, superior to the diploma issuance date.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)); *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony). Dr. testimony is not in accord with other evidence in the record.

The record contains a September 9, 2014 letter from the Controller of Examinations for stating that the beneficiary "has completed his B.E. Information Technology Degree in the year May – 2003. The provisional Certificate is sufficient to be considered as proof of degree completion. He obtained Degree Certificate in the on September 15, 2004." An October 27, 2014 letter from the Controller of Examinations for repeats the statements of the previous letter and adds that "the date of completion of these requirements more accurately reflects the date on which the degree was earned, rather than the date of issuance of the Degree Certificate. . . regardless of when this actual Degree Certificate was issued, the date of completion of the requirements towards the degree becomes the definitive date on which the degree was earned, and is so indicated on Mr. as May 2003." In the petitioner's view this language confirms that the beneficiary graduated in May 2003. We do not agree with this interpretation of the controller's letters. The first and second letter state that the provisional certificate is considered proof of degree completion. Neither letter discusses the relevance of the date of passage of the final examination. The beneficiary's provisional certificate was not issued until September 12, 2003. The letters are internally inconsistent in that they state that the beneficiary's date of completion of the requirements toward the degree is May 2003 when the provisional certification was not issued until September 2003. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The beneficiary's degree certificate from reads, in pertinent part, as follows:

> . . . has been admitted to the degree of Bachelor of Engineering in Information Technology, he/she having been certified by duly appointed Examiners to be qualified to receive the same and was placed in the First Class at the Examination held in May 2003, Given under the seal of this University, Dated 15-09-2004.

The beneficiary's September 12, 2003 provisional certificate from reads, in pertinent part, as follows:

> has qualified for the degree of Bachelor of Engineering and he/she having passed the above Degree Examination held in May-2003 as follows:

We do not interpret the language in the degree certificate or the provisional certificate as equating the passage of the final examination with obtaining the bachelor's degree.

On appeal, the petitioner contends that, even in the United States, conferral of a degree is no longer concurrent with the physical convocation of the student and that conferral is an administrative procedure that consists of posting a notation of a student's transcripts. In support of these statements the petitioner submits information from indicating that:

> "Conferral" means that the University Registrar posts a notation of the award of a degree in our academic record-keeping system. For most purposes, the terms "graduation" and "conferral of a degree" are synonymous. "Commencement," however, is another matter . . . Degrees are conferred upon members of the graduating class one at a time, after the final grades are posted for the final decree requirements of each student's academic program.

See www (accessed March 10, 2015). However, the petitioner's contention is unpersuasive. The diploma and provisional certificate state that the beneficiary was only qualified for and had not been conferred his bachelor's degree upon completion of the May 2003 examination.

Even if we were to accept the petitioner's contention that the beneficiary's degree was "conferred" under such a system, the degree would not have been conferred until after July 2003. The certificates the beneficiary received after completing his 7th semester examination in November 2002 and his 8th semester examinations in May 2003 were not issued until March 31, 2003 and July 22, 2003, respectively. The certificates state that the 7th semester result was declared on February 13, 2003, and the 8th semester result was declared on July 10, 2003. Furthermore, the beneficiary's September 22, 2003 consolidated statement of marks does not contain an annotation that the beneficiary had been awarded a bachelor of engineering in information technology. Based on these documents it appears that the beneficiary's examination results were not determined until July 2003, which means that no degree could have been awarded before July 2003 at the earliest. Even if we consider the degree date as July 10, 2003, a position we do not take, the beneficiary did not amass five years of post-baccalaureate experience at (July 10, 2003 to April 9, 2004), (April 12, 2004 to

March 13, 2007) and the petitioner (April 12, 2007 to July 12, 2008) before starting work with in the proffered position on July 13, 2008.

USCIS has consistently held in employment-based immigrant petitions under sections 203(b)(2) and (3) of the Act that the date of an academic degree is the date of its conferral as stated on the document itself. While some educational institutions, including may view the effective date of a degree differently for their own purposes of program completion, graduation, or admission to a further degree program, and some employers may view passage of a final examination as tantamount to a degree for hiring purposes, we are not bound by any such policies or modus operandi in our adjudication of the instant petition.

We are bound by the Act, agency regulations, precedent decisions of the agency, and published decisions from the federal circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F.Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even internal memoranda of USCIS do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

Based on the foregoing discussion, we agree with the director that the operative date of the beneficiary's Bachelor of Engineering is September 15, 2004, the date it was conferred upon him by . As the beneficiary's work experience up to that date was pre-baccalaureate, it cannot be counted as qualifying post-baccalaureate experience under the regulations at 8 C.F.R. § 204.5(k)(2) and 8 § 204.5(k)(3)(i)(B). The record shows, therefore, that the beneficiary had only 3 years, 8 months and 26 days of qualifying experience before the priority date of August 8, 2013. Thus, while he has a U.S.-equivalent bachelor's degree in information technology, the beneficiary does not have the equivalent of an advanced degree under 8 C.F.R. § 204.5(k)(2) and does not meet the requirements for the proffered position.

Accordingly, the beneficiary is not eligible for classification as an advanced degree professional under section 203(b)(2) of the Act, and does not qualify for the job of systems analyst under the terms of the labor certification. The director's decision denying the petition is affirmed.

Ability to Pay

Beyond the decision of the director,[6] the petitioner has also failed to establish its continuing ability to pay the proffered wage as of the priority date. *See* 8 C.F.R. § 204.5(g)(2).

[6] We may deny an application or petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that we conduct appellate review on a *de novo* basis).

According to USCIS records, the petitioner has filed at least ten (10) I-140 immigrant petitions on behalf of other beneficiaries since the priority date. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. In any future filings, the petitioner must provide evidence of its continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.